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Office of Administrative Law Judges
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Issue Date: 28 October 2008

Case No.: 2008-AIR-00013

In the Matter of:

PATRICIA A. HINDSMAN
Complainant,

v.

DELTA AIR LINES, INC.,
Respondent.

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This proceeding arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 CFR Part 1979, published at 67 Fed. Reg. 15453 (Apr. 1, 2002).

PROCEDURAL HISTORY

On February 27, 2008, Complainant, Patricia Hindsman, timely filed her Complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor. On June 6, 2008, after conducting an investigation, OSHA's regional director issued a determination advising the parties that she found no evidence to believe that the Respondent had violated AIR 21. Thereafter, Complainant timely filed her objections and request for a de novo hearing with the Office of Administrative Law Judges, U.S. Department of Labor, on July 15, 2008. On October 1, 2008, Respondent filed this Motion for Summary Decision. On October 14, 2008, Complainant filed a Cross-Motion for Summary Decision and Opposition to Respondent's Motion for Summary Decision. On October 23, 2008, Respondent filed an

Opposition to Complainant's Motion for Summary Decision. A hearing in this case is scheduled for November 5, 2008 in Atlanta, Georgia.

STATEMENT OF FACTS¹

On October 1, 2007 Complainant was working as the Lead Flight Attendant on Delta Flight 1587 from St. Louis to Atlanta. (EX A at 3; CX 5A.) Prior to departure and before the aircraft door had been closed, Complainant performed a final safety check of the main cabin. (EX A at 3; CX 5A.) While closing the overhead bins Complainant discovered a portable oxygen concentrator ("POC") stowed in one of the compartments. (EX A at 3; CX 5A.) Complainant found that the device was not listed on the Flight Attendant's Pre-Departure Report, so Complainant approached the Gate Agent to ask if she knew anything about the POC. The Gate Agent responded that she did not know about the POC in the bin, but believed that all POCs were allowed on board the aircraft. Complainant next reported the POC to the captain, who also thought that all POC devices were allowed onboard. (EX A at 3; CX 5A.) Complainant responded that according to her Flight Attendant On Board Manual ("OBM") only certain FAA-approved POCs were allowed on board. (EX A at 3; CX 5A.)

Complainant then returned to the cabin to find out who owned the POC and learned that it belonged to an elderly couple sitting at 20A/20B. (EX A at 3; CX 5A.) The couple was also unaware of the make and model of the POC, and became belligerent toward the complainant. Thus, Complainant requested assistance. (EX A at 3; CX 5A.) A Lead Agent came and first stated that the passengers would have to be removed and placed on a later flight. (EX A at 3; CX 5A.) However, after speaking to someone on the radio, the Lead Agent stated, "We are not delaying this flight to resolve the problems so are you going to take them, or do you want them taken off the aircraft?" Complainant replied that she did not want that responsibility. (EX A at 3; CX 5A.) Still, the Lead Agent asked the Complainant again what she wanted to do. (EX A at 3; CX 5A.) Thus, the Complainant returned to the captain, who became annoyed and stated that he could not find anything in the manual. (EX A at 3; CX 5A.)

Finally, Complainant returned to the cabin and asked the couple whether she could look at the canister. (EX A at 3; CX 5A.) The husband assisted her in finding the information that she needed on the POC. (EX A at 3; CX 5A.) Complainant matched the numbers on the unit to the numbers listed in the OBM and determined that the POC was FAA approved. (EX A at 3; CX 5A.) Another flight attendant informed the captain that the device was FAA approved, and he replied, "Shut the door and let's go." While Complainant was still returning the POC to the overhead bin, the other flight attendant closed the cabin door and the jetway was pulled. (EX A at 3; CX 5A.)

While the plane taxied out Complainant asked the captain to find out the name of the Lead Agent. (EX A at 3; CX 5A.) The Captain responded that "he felt that if he asked for the

¹ The following abbreviations will be used in this Decision: Mot. – Respondent's Motion for Summary Decision; Cross-Mot. – Complainant's Cross-Motion for Summary Decision; EX – Respondent Exhibit; CX – Complainant Decision.

name of the agent that she would think [Complainant] was going to write her up, then she would write [Complainant] up and the situation would come back to bite [Complainant].” (EX A at 3; CX 5A.) The Captain stated, “I am only trying to help you.” Complainant responded that “she was going to report the incident because she could not believe that someone made the decision to put ‘on time’ over the safety of the passengers and crewmembers.” (EX A at 3; CX 5A.) The Captain tried to dissuade her from making the complaint by stating that “it would probably come back to bite [Complainant], and that he was only trying to help her.” (EX A at 3; CX 5A.) Complainant states that “one of the responsibilities of a flight leader is to maintain awareness of all situations on and off the aircraft and is vigilant in protecting oneself, crewmembers, customers, and Delta property,” which is what she was trying to do. (EX A at 3; CX 5A.) The flight was recorded leaving the gate at eight minutes after scheduled departure. (EX D at 3; CX 12(c).)

SUMMARY OF THE ARGUMENTS

Respondent’s Motion for Summary Decision

First, Respondent argues that Complainant’s case should be dismissed because there are no material factual disputes in the case, Complainant’s does not have a *prima facie* case, and Complainant cannot establish that the stated reasons for her termination are a pretext for unlawful retaliation. Regarding the first argument, Respondent states that there is no genuine issue of material fact, (Mot. 18), and that their Motion is supported by the allegations of Complainant, which are found in the documents that she submitted to OSHA in support of her complaint. (Mot. 2.) Respondent has submitted as evidence all of the documents that the Complainant originally filed in her OSHA complaint. (EX A-D.)

Next, regarding the second argument, Respondent asserts that Complainant’s complaint did not report any violations regarding FAA regulations, and therefore Complainant does not have a *prima facie* case. (Mot. 19.) In the alternative, Respondent argues that even if the Complainant had engaged in protected activity, such activity was not a contributing factor in an unfavorable personnel action, and thus, Complainant still does not have a *prima facie* case. (Mot. 20.) In support of the argument, Respondent states that the Complainant “did not return to work, was not disabled, and was unwilling to go to counseling for her fear of flying.” (Mot. 21.) Thus, Respondent argues that it was only Complainant’s refusal to go to counseling that made her absences unexcused, and her refusal to return to work that caused her termination. (Mot. 21.)

Finally, Respondent argues that even if Complainant can show a *prima facie* case, Delta’s stated reasons for its Complainant’s termination are not a pretext for unlawful retaliation. (Mot. 22.) Respondent argues that Delta tried to convince the Complainant to return to work, but it was only after she refused to return that she was terminated for job abandonment. (Mot. 22.) Respondent further argues that job abandonment is a lawful basis for termination, and there is no evidence that her termination was based on anything else. (Mot 22.)

Complainant's Cross-Motion for Summary Decision

Complainant argues that she has made a *prima facie* case of discrimination under AIR 21 by showing that she engaged in protected activity that was a contributing factor in unfavorable personnel actions against her. Complainant argues that Delta disregarded safety twice. First, when “ground personnel made a decision to put an on-time departure over the safety of the aircraft . . . by attempting to dispatch the flight without first taking the time to investigate the reported safety issue [regarding the POC].” (Cross-Mot. 2.) Second, when the captain closed the aircraft doors before the cabin was secure. (Cross-Mot. 8.)

Regarding these alleged violations, Complainant states that she engaged in protected activity several times, including: informing the Captain of her intent to report the safety violations; reporting and discussing the alleged violations to Delta, FAA, her supervisor, the Senior Vice-President of Human Resources, the EAP counselor, and the Delta's Ethics & Compliance Department Hotline; refusing to return to flying; and filing a claim with OSHA. (Cross Mot. 11.) Complainant further argues that, as a result of her participation in protected activity, she suffered from several adverse personnel actions, thereby establishing a *prima facie* case. (Cross-Mot. 12-13, 29.)

Complainant also argues that although Delta cited her refusal to return to work as the primary reason for Complainant's termination, her refusal to fly was protected activity due to her reasonable belief that her working conditions were unsafe. (Cross-Mot. 14.) Thus, Complainant argues that, since her work refusal was protected activity and not job abandonment, Delta's explanation for her termination based on job abandonment is a pretext for unlawful retaliation. (Cross-Mot. 14-15.)

Complainant's Opposition to Motion for Summary Decision

In the alternative Complainant argues that Respondent's Motion for Summary Decision does not address any material facts, and offers no legitimate, substantiating facts or evidence to support its claims. (Cross-Mot. 29.) In support of her argument, Complainant points to Respondent's statements that “[Complainant] was so unhappy that the Gate Agent and the Captain expected her, as Flight Leader, to confront the passenger that she refused to fly for Delta again,” and that “[Complainant] was unwilling to go to counseling for her fear of flying.” (Cross-Mot. 29-30.) Complainant alleges that the Respondent has misconstrued the facts regarding her feelings and emotions, and thus a genuine issue of material fact exists. (Cross-Mot. 29-30.)

STANDARD OF REVIEW

In ruling on a motion for summary decision, an administrative law judge may grant the motion if the “pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact.” 29 C.F.R. § 18.40(d). A fact is material and precludes granting summary decision if proof of the fact “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986). A dispute about a material fact is ‘genuine’ . . . if the evidence is such that a reasonable [finder of fact] could return a verdict for the non-moving party.” *Id.*

Initially, the party moving for summary decision has the burden of showing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This burden may be discharged by demonstrating that the nonmovant cannot make a showing sufficient to establish an essential element of the case. *Id.* at 325. Thereafter, the burden shifts to the nonmovant who must “set forth specific facts showing that there is a genuine issue of fact for the hearing.” *See* 29 C.F.R. § 18.40(c). The opposing party may not rest upon mere allegations or denials. *Id.* In determining whether there is a genuine issue of fact for the hearing, the judge shall view “all the evidence and factual inferences in the light most favorable” to the nonmovant. *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 20, 1999) (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-9 (1969)). If there are no genuine issues of material fact, then the moving party is entitled to judgment as a matter of law. *See Dawkins v. Shell Chemical, LP*, 2005-Sox-41, slip op at 2 (ALJ May 16, 2005).

DISCUSSION

Protected Activity

In this matter, Respondent asserts that it is entitled to summary decision because Complainant cannot establish all of the essential elements of his whistleblower claim as a matter of law. The legal burdens of proof in whistleblower actions are set forth in 49 U.S.C. § 42121(b), AIR 21. In order to prevail, a complainant must prove by a preponderance of the evidence that (1) he engaged in a protected activity or conduct; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action. *See* 49 U.S.C. §42121(b)(2)(B); *see also Peck v. Safe Air International, Inc.*, 2001-AIR-3 (ALJ Dec. 19, 2001). Specifically, Respondent asserts in its Motion for Summary Decision that Complainant cannot prove the following elements: (1) that Complainant engaged in protected activity; or (4) that the protected activity was a contributing factor in the unfavorable personnel action.

Under AIR 21 protected activity occurs when an employee provides the employer with information regarding “any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety” 49 U.S.C. § 42121(a)(1). The Complainant must provide information that is specific in relation to a given practice, condition, directive or event, which violates some FAA order, regulation, or standard. *Lanigan v. ABX Air, Inc.*, Case No. 2007-AIR-10 at 17 (ALJ Decision and Order, April 30, 2008). Although the information does not need to cite a specific violation, the Complainant must relate the specific practice, condition, directive or event to a violation of a federal aviation safety regulation. *Id.* Moreover, “competently or aggressively carrying out one’s duties to ensure safety does not by itself constitute protected activity.” *Id.* Respondent argues in their Motion for Summary Decision that Complainant has not established a *prima facie* case because she did not engage in protected conduct under AIR 21 as a matter of law. More specifically, Complainant argues that Respondent has not related the reported event

to a violation of some federal safety regulation, and that Complainant was merely competently carrying out her own duties to ensure the safety of the air carrier.

Complainant's initial report to Delta summarized the specific event that took place on October 1, 2007. Complainant argues that this specific event relates to a safety violation because "ground personnel made a decision to put an on-time departure over the safety of the aircraft . . . by attempting to dispatch the flight without first taking the time to investigate the reported safety issue [regarding the POC]." Complainant bases this argument on the actions of the Lead Agent who, after speaking with ground personnel on the radio, said "We are not delaying this flight to resolve the problems, so are you going to take them or do you want them taken off the aircraft?" (EX A at 3; CX 5A.) Complainant further argues that neither the ground personnel nor the Lead Agent was aware of whether the POC on the plane was FAA approved, but yet they did not want to delay the flight to investigate the matter, thus creating a safety violation.

Still, Complainant's claim is without merit as none of the actions of the Lead Agent or the ground personnel actually violated a safety regulation. First, mere words do not create a violation when the actual conduct of the parties does not create a violation. Although the Lead Agent said, "[w]e are not delaying this flight to resolve the problems," in actuality the Complainant took the time to investigate the matter and the flight was delayed by eight minutes. (EX A at 3; CX 5A; EX D at 3; CX 12(c).) Yet, based on this statement, Complainant argues that none of the parties knew whether the POC was approved, and therefore should not have attempted to dispatch the flight, but instead, should have investigated the matter further. However, there is no evidence that the Lead Agent neglected safety by not personally investigating the matter. Although the Lead Agent did not know the status of the POC, she never stated that Complainant must leave the POC on board the flight. Instead, the Lead Agent told the Complainant that she could choose to remove the POC from the flight. Thus, the Lead Agent did not neglect safety, but delegated the responsibility to the Lead Flight Attendant, as it was the Complainant's duty to maintain safety onboard the aircraft. (EX A at 3; CX 5A.) Furthermore, there is no evidence that Delta actually attempted to dispatch the flight before an investigation of the matter. Instead, the evidence shows that Delta did not dispatch the flight until the matter was investigated by its employee, the Complainant, and she determined that the POC was FAA approved. (EX A at 3; CX 5A.) Finally, Complainant argues that the Captain ordered the cabin doors closed before the cabin was secure. However, it is undisputed that the Captain was aware that the POC was FAA approved before he ordered the doors closed. (EX A at 3; CX 5A.)

Complainant states in her initial report to Delta that "one of the responsibilities of a flight leader is to maintain awareness of all situations on and off the aircraft and is vigilant in protecting oneself, crewmembers, customers, and Delta property." It is clear that Complainant did vigilantly perform her safety responsibilities on October 1, 2007 by discovering the POC and eventually checking the numbers on the POC against her OBM to determine that it was FAA approved. However, if Complainant had compared the numbers on the POC to her OBM when she initially found the POC, she would have discovered it was FAA approved, and the entire incident would have been avoided. Although Complainant felt compelled to involve other employees, she does not allege that they had an OBM with them, or that they had any information allowing them to assess the POC. Yet, it is undisputed that she had the information necessary to determine whether the POC was allowed on board, and that she did resolve all

safety issues regarding the POC before the cabin doors were closed or the flight was dispatched. Thus, since Complainant was merely aggressively carrying out her duties as lead flight attendant to ensure safety and has not related the incident on October 1, 2007 to any violated federal aviation safety regulation, her reports to Delta and others regarding the incident do not constitute protected activity. Based on these facts the Presiding Judge finds that Complainant has not made a *prima facie* case under AIR 21.

Undisputed Facts

In viewing the evidence in the light most favorable to Complainant, the nonmoving party, the Presiding Judge finds that the Respondent has met its burden of proving that there are no genuine issues of material fact regarding this element. Specifically, Respondent does not dispute any of the Complainant's factual allegations, but instead argues that "even accepting all of her allegations as true, she did not engage in protected conduct" (Mot. 18.)

In order to survive this motion, Complainant must set forth specific facts showing that there is a genuine issue of material fact for the hearing. Complainant argues that Respondent's Motion for Summary Decision "does not address any material facts, and offers no legitimate, substantiating facts or evidence to support its claims." (Cross-Mot. 29.) In support of her argument, Complainant points to Respondent's statements that "[Complainant] was so unhappy that the Gate Agent and the Captain expected her, as Flight Leader, to confront the passenger that she refused to fly for Delta again," and that "[Complainant] was unwilling to go to counseling for her fear of flying." (Cross-Mot. 29-30.) Complainant alleges that the Respondent has misconstrued the facts regarding her feelings and emotions, and thus a genuine issue of material fact exists. A dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable [finder of fact] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). These examples do not meet Complainant's burden to show a genuine issue of material fact. Respondent's interpretations of Complainant's emotions and feelings regarding the incident were immaterial to the decision. The decision was based solely on the undisputed facts stated in the information that the Complainant reported to Delta. Thus, there are no genuine issues of material fact left to be decided with regard to the issue.

Conclusion

Respondents have proven that Complainant cannot make a showing sufficient to establish the first element of a *prima facie* case. Complainant's activity is not protected under AIR 21. Thus, since there are no genuine issue of material fact to be decided in this case, the Respondent are entitled to summary decision as a matter of law, and Complainant's Cross-Motion for Summary Decision is moot.

ORDER

For the reasons stated in the foregoing discussion, Respondent's Motion for Summary Decision is **GRANTED**.

In view of the foregoing, the hearing scheduled on **November 5, 2008** at **9:00 A. M.** as setting one in **Atlanta, Georgia** is hereby **Cancelled**.

IT IS ORDERED THAT THIS COMPLAINT IS DISMISSED.

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DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/bf
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).